

JUSTICES AS “SACRED SYMBOLS”: ANTONIN SCALIA AND THE CULTURAL LIFE OF THE LAW

by Brian Christopher Jones* and Austin Sarat†

The idea of the brilliant and elegant philosopher judge has a long and romanticized history. From Sir Edward Coke, William Blackstone and Joseph Story to Oliver Wendell Holmes, Louis Brandeis and Lord Bingham, the common law is replete with this vision of judging. In this vision, judges sometimes seem to be law makers as much as faithful interpreters. In many ways Antonin Scalia fought against this traditional vision of the philosopher judge. He disliked activist judges who imposed their idea of wisdom on elected legislatures; in fact, he trumpeted his jurisprudence for its fidelity to law and deference to the popular will. But even though Scalia fought against the romantic vision of philosopher judge, he himself became a living symbol of a judicial philosophy, a symbol so powerful that sometimes it was difficult to disentangle the judge from his jurisprudence. His status as a symbol and how he achieved his status, was much different from the route of the judges mentioned above. This paper attempts to explain how Scalia became what we call a judicial “sacred symbol”.

I. SCALIA’S DEATH

Antonin Scalia died in the early morning hours of February 13, 2016. Reactions to his death were resoundingly, even if begrudgingly, praiseworthy; either way you cut it, Scalia was a giant in terms of his impact on American law. Justice Ruth Bader Ginsburg, one of Scalia’s closest friends on the Court—but also an ideological sparring partner—said, “‘We are different, we are one’, different in our interpretation of written texts, one in our reverence for the Constitution and the institution we serve”.¹ Even those outside traditional legal and political circles took note of Scalia’s passing and commented on his larger than life status.. Stephen Colbert, a late-night comedian who on many occasions had lambasted Scalia’s views on the law, recounted an unexpectedly warm moment with the Justice, and praised him for his sense of humour,² a characteristic that we also explore below. Colleagues, friends, journalists, acquaintances, and others, acknowledged him as a quintessential, if controversial, American judge.

A range of memorials and acknowledgements followed Scalia’s death. The George Mason University School of Law announced it would rename itself: The Antonin Scalia Law School

* Lecturer in Public Law, Department of Law, Liverpool Hope University. The authors wish to thank the members of Institutum Iurispudentiae, Academia Sinica (Taipei, Taiwan) for their comments during a symposium on this topic.

† William Nelson Cromwell Professor of Jurisprudence and Political Science, Amherst College.

¹ All things Considered, *Ginsburg And Scalia: ‘Best Buddies’*, NPR (February 15, 2016), <http://www.npr.org/2016/02/15/466848775/scalia-ginsburg-opera-commemorates-sparring-supreme-court-friendship>.

² The Late Show with Stephen Colbert (February 16, 2016), <https://youtu.be/jeJHrIqWsNw>.

at George Mason University.³ Law reviews published tributes. For example, the *Minnesota Law Review* published an online symposium providing a number of insightful articles about Scalia,⁴ and the *Harvard Law Review* dedicated an issue to the late Justice, complete with commentary from Chief Justice John Roberts, Justice Elena Kagan, Justice Ruth Bader Ginsburg, Cass Sunstein, John Manning, Martha Minow and Rachel Barcow.⁵ One prominent legal scholar who has written extensively about judges's legacies noted that Scalia "has a definite shot at greatness".⁶

In fact a marked difference highlighted reactions to Scalia's death and the death of former Chief Justice William Rehnquist one decade earlier, on December 5, 2005. Beyond the shock of an untimely death—it was known for some time that Rehnquist was battling cancer—Scalia's death left not only a vacancy on the Supreme Court, but was also blow to conservative legal thought. While Rehnquist had served on the Court longer than Scalia, it was Scalia who had pushed for the Court to move its jurisprudence in a different direction.⁷ Rehnquist may have moved the Court—and therefore America—to the right simply by his presence, but Scalia, arguably, moved an entire body of legal thought to the right, and made it so that even those who did not agree with his interpretative methods had to come to terms with them.⁸ But as Justice Kagan has recently said, it was not just his interpretive methodologies that were significant. As she put it, the late justice "did nothing less than transform our legal culture".⁹ Indeed, as we will discuss below, Scalia significantly pushed the boundaries judicial behaviour—both on and off the bench—within the United States and potentially abroad. Indeed, he was not merely a judge, but a marketer and perhaps even a showman...and a formidable one at that.

A. A CRISIS OF SCALIAN PROPORTIONS

Although the passing of any justice during a presidential election year would generate controversy and concern, the passing of such a provocative and widely celebrated justice certainly enhanced the chaos, creating a quasi-constitutional crisis. In one incident, the Chair of the Senate judiciary committee (Sen. Chuck Grassley (R., IA)), made an unprecedented speech on the Senate floor about the politicisation of the Supreme Court, accentuating that such politicisation—or, at least, the appearance of it. Grassley claimed that this was not the

³ Susan Svrluga, *It's official: George Mason's law school is named in honor of Antonin Scalia*, WASHINGTON POST (May 17, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/05/17/its-official-george-masons-law-school-is-named-in-honor-of-antonin-scalia/>.

⁴ *Scalia Symposium*, 101 MINN. L. REV. HEADNOTES (2016), <http://www.minnesotalawreview.org/headnote-issue/volume-101-scalia-symposium/>.

⁵ *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 1 (2016).

⁶ Jack Balkin, *Justice Scalia's Legacy*, BALKINIZATION (Sept. 7, 2016), <https://balkin.blogspot.co.uk/2016/09/justice-scalias-legacy.html>.

⁷ Although, it should be acknowledged that Rehnquist contributed to the originalist movement as well, if only by denouncing "living constitutionalism". See, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

⁸ As Justice Kagan famously noted in her confirmation hearings, "we are all originalists" (see Jonathan H. Adler, *The Judiciary Committee Grills Elena Kagan*, WASH. POST (June 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/29/AR2010062902652.html>).

⁹ *Six Justices help dedicate Mason's Scalia Law School*, Antonin Scalia Law School, George Mason University, <https://www2.gmu.edu/redefining-excellence/six-justices-help-dedicate-mason%E2%80%99s-scalia-law-school>.

result of the Senate's confirmation processes,¹⁰ but because of the Court's own decisions. Senator Grassley even boldly instructed Chief Justice John Roberts, "physician, heal thyself", as regards the Court's overly political decisions.¹¹ While Senator Grassley's comments surprised and even angered some, recent polls have demonstrated that the American public has less confidence in the Supreme Court than at any point in history; a July 2016 Gallup poll found that 52% of Americans disapproved of the way the Supreme Court was handling its job.¹²

Scalia's death has also left a four-four ideological split among the Court's remaining justices. In some nations this would not be a major issue, but for one in which the Supreme Court decides the "nation's most pressing issues",¹³ it is indeed a problem. On March 16, 2016, President Obama nominated judge Merrick Garland of the United States Court of Appeals for the District of Columbia Circuit, to replace Scalia. The Senate refused to move forward on his nomination, and Judge Garland endured the longest-delay of any Supreme Court nominee in history, passing the likes of Robert Bork and Clarence Thomas, as he awaiting a hearing (that would never come) on his nomination.¹⁴

There are signs that, even after the recent Presidential election in the United States, Senate approval of Supreme Court nominations could still be a major constitutional issue. Before the election, some Republicans discussed the possibility, that should Hilary Clinton become President, that the Senate would of refuse to confirm any of her.¹⁵ And now that Donald Trump has won the presidency, Democrats may employ various delaying strategies against anyone he nominates. As Graham notes, the proposed Republican plan would have been the opposite of FDR's infamous court-packing plan, slowly diminishing the number of justices on the Court. To justify this effort, some commentators claimed that the Constitution allows for non-confirmation of any Presidential nominees to the Court.¹⁶ While it is possible that any death on the "conservative" side of the Court could have brought this situation about, the fact that it was Scalia's seat which came open amplified the stakes in replacing him.

B. THE PROGRESSION OF THIS ARTICLE

¹⁰ *Senator Chuck Grassley on Politicization of the Supreme Court*, C-SPAN (April 5, 2016), <https://www.c-span.org/video/?c4587587/senator-chuck-grassley-politicization-supreme-court>. Just days earlier, Chief Justice John Roberts gave a speech denouncing the Senate confirmation process as politicising the American judiciary, and more importantly, the Supreme Court (Adam Liptak, *John Roberts Criticized Supreme Court Confirmation Process, Before There Was a Vacancy*, N.Y. TIMES (March 21, 2016), available at <http://nyti.ms/1Rep9Ps>).

¹¹ *Id.*

¹² *Supreme Court*, GALLUP, <http://www.gallup.com/poll/4732/supreme-court.aspx> (although, the percentage disapproving dropped to 47 in September 2016).

¹³ Editorial Board, *A Crippled Supreme Court's New Term*, N.Y. TIMES (October 3, 2016), <http://nyti.ms/2d7WGhO>.

¹⁴ John Shuppe, *Merrick Garland Now Holds the Record for Longest Supreme Court Wait*, REUTERS (July 20, 2016), <http://www.nbcnews.com/news/us-news/merrick-garland-now-holds-record-longest-supreme-court-wait-n612541>.

¹⁵ David A. Graham, *What Happens If Republicans Refuse to Replace Justice Scalia?*, THE ATLANTIC (November 1, 2016), <http://www.theatlantic.com/politics/archive/2016/11/whats-the-opposite-of-court-packing/506081/>.

¹⁶ Ilya Shapiro, *The Senate Should Refuse To Confirm All Of Hillary Clinton's Judicial Nominees*, THE FEDERALIST (October 26, 2016), <https://thefederalist.com/2016/10/26/senate-refuse-confirm-hillary-clintons-judicial-nominees/>.

To try to make sense of the meaning of, and reactions to, Scalia's death, we investigate how Scalia became a "sacred symbol".¹⁷ First we examine the changing role of the American judiciary, and how Scalia became the perhaps the face of it. While American judges have a long history of engaging in Academic scholarship,¹⁸ only relatively recently have they become more publicly engaged, giving lectures and appearing on television, in addition to appearing at promotional events for books they author. Are such changes here to stay; and if so, what does this mean for the cultural life of the law?

We follow this by addressing Scalia's rise as the leader of conservative jurisprudence. Tracking Scalia's trajectory, including his connections to the 1980s conservative movement and other prominent conservative legal thinkers, like Robert Bork, is essential to understanding his "sacred symbol" status. Here the issue of judicial "mandates" arises. Although it may be odd to think in such terms, many American judges are characterised throughout their careers by reference to who nominated them and when they were nominated. Indeed, nomination by a particular president often impacts how the media or general public perceives justices. We discuss the significance of the perception that Supreme Court judges have "mandates".

Next, we consider Justice Scalia's writing. Scalia was notorious for the strident tone and rhetorical ingenuity of his opinions and often mentioned that this was used to engage his readers. While questions arise concerning the audience for Supreme Court opinions, it is not surprising that Scalia had his own thoughts on the matter: he repeatedly stated throughout the years that one of the primary audiences for judgments was law students. Connected to Scalia's writing, we scrutinise the way he used humour. He often found moments for laughter, and this was especially so on the bench—either in oral argument or through his sarcastic opinions.

In the following section we examine how Justice Scalia used and marketed his jurisprudential theories. His prolific writing and active promotion of "originalist" and "textualist" theories raises further questions about judges and their connection to popular culture. Finally, we return to the idea of Scalia as a "sacred symbol" and consider how this idea may impact the cultural life of the law. Although there is a large literature on judicial reputation and the behaviour of judges,¹⁹ we take a different—perhaps complementary—approach, examining Justice Scalia's cultural significance and impact, and using him as a lens to help us better understand the cultural relevance, and consequence, of judging in the 21st century.

II. THE CHANGING (PUBLIC) ROLE OF THE JUDICIARY

In some jurisdictions supreme or constitutional court justices seem to be contemporary deities, balancing the scales of justice through reasoned (and sometimes impassioned) judgments; in other jurisdictions, such judges are merely...well, judges. This distinction sometimes hinges

¹⁷ We are hesitant to provide a definition of "sacred symbol" here, but do so below, after we have taken these issues into consideration. In terms of how Scalia may have been a "sacred symbol" not only in America but also in foreign jurisdictions, see James Allen's article in this collection: James Allen, *One of My Favourite Judges: Constitutional Interpretation, Democracy and Antonin Scalia*, BRIT. J. AM. L. STUDIES (2017).

¹⁸ See Jeffrey M. Shaman, *Judges and Non-Judicial Functions in the US*, in H.P. LEE, JUDICIARIES IN COMPARATIVE PERSPECTIVE (2011), 519-523.

¹⁹ See, e.g., NUNO GAROUPA AND TOM GINSBURG, JUDICIAL REPUTATION: A COMPARATIVE THEORY (2015); LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006).

on constitutional structures and types of judicial review available in particular jurisdictions, but as other researchers have acknowledged, separating strong-forms and weak-forms of review is not as easy as it seems.²⁰ Yet Justice Scalia's judicial career highlighted a number of important issues concerning the contemporary role and status of the judiciary.

Without a doubt, states throughout the world have recently gone through a judicial renaissance.²¹ Ginsburg and Virsteeg found that the ability of courts to "supervise implementation of the constitution and to set aside legislation for constitutional incompatibility" increased from 38% in 1951 to 83% in 2011.²² Jurisdictions are increasingly likely to put contentious problems into the hands of judges. Thus we can begin with an uncontroversial statement: that supreme and constitutional courts have prominent structural and cultural positions in their respective jurisdictions. This position primarily revolves around interpreting and applying the law in order to resolve disputes. Constitutional courts are prominent symbols of the operation of the law or legal process within a given state, and judges are widely considered to be the most prominent actors within such processes. This is true whether or not a state's judiciary has a good or bad reputation, or whether judges engage in strong-form or weak form review.

When Alexander Hamilton characterised the American judiciary as the "least dangerous branch"²³ he certainly did not mean that it would be unpopular or culturally irrelevant. In fact, it may be the case that "least dangerous" correlates with "highest approval" or most popular branch of government. Throughout modern history the U.S. Supreme Court has enjoyed relatively high popularity,²⁴ at least compared to Congress.²⁵ The strategic positioning of the Court has also changed throughout its history. Unlike its previous location in the Old Senate Chamber (in addition to other places), the Court now sits in a prominent position in the nation's capitol. Bordered by the Library of Congress to the south, the Capitol to the west, and Constitution Avenue to the north, the building resides in the city's political epicentre. Above the tall roman pillars to the building's entrance is inscribed the phrase: "Equal Justice Under Law". Whether or not this is what the Court actually provides is irrelevant: the takeaway is that, in terms of American justice, the Supreme Court is the most prominent, as well as last, port of call for those seeking a judicial remedy.

Adding to this prominence is the fact that in the United States judges have become more significant as public figures who participate in a wide range of extra-judicial activity, such as delivering speeches, agreeing to interviews, appearing on talk shows, and of course writing scholarly books and articles. While Supreme Court justices—and the American judiciary as a whole—have long been involved in such extra-judicial activities, today they are much more common. But whether or not this increase in extra-judicial activity carries positive implications for the judiciary remains to be seen. As Jeffrey Shaman has stated, the "line

²⁰ Aileen Kavanagh, *What's so weak about "weak-form review"? The case of the HK Human Rights Act 1998*, 13(4) INT'L J. CONSTIT. L. 1008.

²¹ Lee Epstein, Jack Knight and Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35(1) LAW & SOC'Y REV. 117 (2001).

²² Tom Ginsburg and Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J.L. ECON. & ORG. 587 (2014).

²³ Federalist No. 78.

²⁴ *Supreme Court*, GALLUP, <http://www.gallup.com/poll/4732/supreme-court.aspx>.

²⁵ The Court's approval rating remains high even with the numbers mentioned earlier. See, e.g., Brian Christopher Jones, *Disparaging the Supreme Court, Part II: Questioning Institutional Legitimacy*, WIS. L. REV. (2016). The piece notes how the Court, compared to Congress, may get a free ride as regards similar issues, such as workload or institutional output.

between permissible and impermissible extra-judicial activity is not an easy one to walk, and is redrawn from time to time”.²⁶ Justice Scalia was certainly one to push those boundaries.

III. SCALIA’S RISE TO “SACRED SYMBOL”

Some may look at Scalia’s tenure on the Court and find it relatively easy to classify him as a “sacred symbol”; others may scoff at the idea of thinking of him in that way. Sceptics would point to the fact that, although Scalia served on the Court for close to thirty years, he was not even in the top ten of the Supreme Court’s longest-serving justices.²⁷ In fact William Rehnquist served for 33 years, and had more time to impact the Court’s jurisprudence. Additionally, outside of *Heller*,²⁸ Scalia did not author many well-known opinions on major constitutional issues. He was mostly known for, and appeared to thrive on, his predilection for fiery dissents. Finally, although Scalia was certainly respected in the legal community, he did not have a squeaky clean personal reputation. Long known for being smug,²⁹ brash,³⁰ aggressive,³¹ dogmatic,³² and overly sarcastic,³³ Scalia used these qualities to advance his agenda and fend off his rivals.

Nonetheless, many other things turned Scalia into a “sacred symbol”, and these are explored below.

A. JUDGING FOR THE RIGHT: FULFILLING (OR NOT FULFILLING) JUDICIAL “MANDATES”

Like Justices John Roberts, Elena Kagan, Sonia Sotomayor, Clarence Thomas, Steven Breyer and Samuel Alito, and a host of other SCOTUS justices before them, Scalia had extensive experience in federal (or state) government before ascending to the bench, and thus was familiar with the politics of law and the law of politics. Scalia served in government at a time when ideas about originalism were on the move both intellectually and practically, and like any great opportunist—and without a doubt, Scalia was one—Scalia took advantage of it. When Bork,³⁴ Rehnquist³⁵ and Berger³⁶ were publishing their influential work on originalism,

²⁶ Jeffrey M. Shaman, *Judges and Non-Judicial Functions in the US*, in H.P. LEE, JUDICIARIES IN COMPARATIVE PERSPECTIVE (2011), p. 528.

²⁷ *List of United States Supreme Court Justices by time in office*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_United_States_Supreme_Court_Justices_by_time_in_office.

²⁸ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²⁹ Joe Patrice, *Justice Scalia Forced To Eat Crow For His Own Smugness*, ABOVE THE LAW (September 3, 2014), <http://abovethelaw.com/2014/09/justice-scalia-forced-to-eat-crow-for-his-own-smugness/>.

³⁰ Joe Johns, *Antonin Scalia known for sharp mind and brash demeanor*, CNN, <http://edition.cnn.com/videos/us/2016/02/13/justice-antonin-scalia-legacy-supreme-court-johns.cnn>.

³¹ Margaret Talbot, *Supreme Confidence*, NEW YORKER (March 28, 2005), <http://www.newyorker.com/magazine/2005/03/28/supreme-confidence> (“Scalia’s interactions with lawyers are notoriously aggressive.”)

³² Dahlia Lithwick, *Scalia v. Scalia*, ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/scalia-v-scalia/361621/> (“But once he was ensconced among the chosen few, a dogmatic...need to be right became [Scalia’s] guide.”)

³³ Richard L. Hasen, *The Most Sarcastic Justice*, 18 GREEN BAG 215.

³⁴ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

³⁵ William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

³⁶ RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977).

Edwin Meese had control of the Reagan Justice Department.³⁷ After a stint in the powerful Office of Legal Counsel (1974-1977), Scalia spent a few years working in academia at the University of Virginia and then at the University of Chicago, honing his views on law and especially on his interpretative theories. During this time he served as the founding faculty adviser of the Federalist Society, a group which advocates judicial restraint, but that also champions conservative causes.³⁸ Scalia forged a conservative ideology that would come to define his jurisprudence, and which ultimately led to two judicial appointments under Reagan: one to the US Court of Appeals (DC Circuit) in 1982, and the other to the Supreme Court in 1986. Scalia's ascension to the Court, like so many other SCOTUS justices, was a reward for political service. But would Scalia fulfil his judicial "mandate" as a Reagan nominee, or would he feel unshackled by his lifetime appointment to the nation's highest court?

The idea of judicial mandates arises from the fact that in the US federal judicial appointment stems from a political process: nominations operate on a fairly open process that involves selection by the President and confirmation from the Senate, two inherently political branches. Until recently that process worked relatively smoothly,³⁹ with the longest hearing or confirmation of a Supreme Court nominee taking 125 days.⁴⁰ Because of this overtly political process, citizens may associate justices with the President who nominated them. In fact, the media consistently link justices with the President nominated them.⁴¹ If citizens are constantly encountering information about which president appointed which justices, then of course there will be an implicit—if not entirely explicit—connection from politics to law.

The expectations arising from judicial mandates fuelled controversy about Chief Justice John Roberts' role in protecting the Affordable Care Act ("Obamacare") from legal challenge in 2012⁴² and 2015.⁴³ Many prominent Republicans spoke out against the Chief Justice, and, as noted above, Senator Chuck Grassley (R., IA) recently directed some pointed words towards Justice Roberts and the politicisation of the Supreme Court.⁴⁴ But Roberts is certainly not the only example of a US Supreme Court justice accused of betraying his "mandate". Justice Harry Blackmun (1970-1994), once beloved by conservatives, was, by the end of his tenure, loathed by the right. Nominated by Richard Nixon, Justice Blackmun earned the enduring ire of conservatives for his decision in *Roe v. Wade*.⁴⁵ He went on to defy his closest friend on the Court, Chief Justice Warren Burger (1969-1986), and in his later years often voted with the court's liberal block. Such "unfulfilled" judicial mandates have not

³⁷ Edwin Meese III, *Speech Before the American Bar Association* (July 9, 1985); *See also*, Edwin Meese, *The Case for Originalism*, THE HERITAGE FOUNDATION (June 6, 2005).

³⁸ *See*, <http://www.fed-soc.org/>, for more information.

³⁹ Of course, not all those that were nominated to the Court acceded to it. There have been many withdrawals and some votes against candidates.

⁴⁰ US Federal Judge Merrick Garland, Barak Obama's Supreme Court nominee to replace Justice Scalia, has waited over 125 days, passing the previous record set by Louis Brandeis, for even a hearing on the possibility of assuming office.

⁴¹ KEITH J. BYBEE, *ALL JUDGES ARE POLITICAL EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW* (2010), p. 12 ("The media regularly identifies federal judges by the president who nominated them and consistently tags judges as either "liberal" or "conservative", implicitly suggesting that judicial actions are best understood as a form of partisan policymaking").

⁴² *National Federation of Independent Business v. Sebelius*, 567 U.S. ____ (2012).

⁴³ *King v. Burwell*, 576 U.S. ____ (2015).

⁴⁴ *Senator Chuck Grassley on Politicization of the Supreme Court*, C-SPAN (April 5, 2016), <https://www.c-span.org/video/?c4587587/senator-chuck-grassley-politicization-supreme-court>.

⁴⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

been uncommon among SCOTUS justices (see Earl Warren, William Brennan, John Paul Stevens and David Souter, among others).

The idea of judicial mandates certainly has political and legal implications that may impact judicial independence, a notion that is considered an essential and long-standing element of the rule of law. If judges feel under any obligation to the president who nominated them, it may compromise their ability to impartially adjudicate.

As regards Scalia, there is no doubt that he fulfilled and even surpassed his mandate. Scalia used his conservative background, perhaps even his religion,⁴⁶ to put himself forward as the “godfather”⁴⁷ of judicial conservatism. Whether or not he stuck firmly to his principles is up for debate,⁴⁸ but the widespread perception of Scalia as the vanguard of conservative jurisprudence remains one of his lasting legacies, and certainly underlined his status as a “sacred symbol”.

B. SCALIA’S INTANGIBLES: A PERSONALITY ON THE COURT

1. HIS WRITING

Long known as a leading “formalist”,⁴⁹ Scalia certainly did not act like a formalist when it came to his writing style or behaviour during oral argument. His writing on the Court often drew a combination of praise, ire and disbelief. How could a Supreme Court justice get away with using “jiggery-pockery”, referencing “broccoli” mandates, or referring to colleagues reasoning as “pure applesauce”? On numerous occasions Scalia noted that he wrote his judgments, and especially his dissents, for law students.⁵⁰ Given the status and prominence of the US Supreme Court—not only from a national perspective but also internationally—this is a curious statement. Was the notion of “writing for law students” merely an excuse to pen his decisions in a more biting or engaging tone?

Law students cannot yet practice law, but they do have to read and discuss Supreme Court opinions. Scalia’s believed that if students must read these opinions, then the decisions should be entertaining and engaging. But if Justice Scalia aimed at legal amateurs, why would he not aim his opinions at the wider citizenry? There is certainly nothing wrong with justices aiming their opinions at a wide audience. After all, using non-technical or “plain language” is something that other judges have championed: Sonia Sotomayor has incorporated plain language tactics, and has noted that the technical language of the law may obscure the relevance of a decision.⁵¹

⁴⁶ Associated Press, *Scalia dismisses religious neutrality: ‘nothing wrong’ with state invoking God*, GUARDIAN (January 2, 2016), <https://www.theguardian.com/law/2016/jan/02/supreme-justice-antonin-scalia-dismisses-religious-neutrality>.

⁴⁷ Noah Feldman, *Justice Scalia: The Last Originalist*, BLOOMBERG VIEW (Feb. 16, 2016), <https://www.bloomberg.com/view/articles/2016-02-16/justice-scalia-the-last-originalist>.

⁴⁸ See Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 12 (2006).

⁴⁹ Cass R. Sunstein, *Justice Scalia’s Democratic Formalism*, 107(2) YALE L.J. 529 (1997).

⁵⁰ See, e.g., Hasen, *supra* note 36, at 223; Molly Cooke, *Justice Scalia Addresses First-year Law Students*, THE HOYA (November 17, 2015), <http://www.thehoya.com/justice-scalia-addresses-first-year-law-students/>.

⁵¹ See, e.g., Steven Schwinn, *Opinion analysis: Plain language rules the day (and keeps a claim alive) in prisoner-rights suit*, SCOTUSBLOG (June 6, 2016), <http://www.scotusblog.com/2016/06/opinion-analysis-plain-language-rules-the-day-and-keeps-a-claim-alive-in-prisoner-rights-suit/>.

But, is not the primary audience for any jurisdiction's supreme or constitutional court the wider citizenry? From a legal perspective the only sub-group supreme court judgments matter to are the parties involved in the litigation. But the higher the court, the more frequently the decisions will be used by lower courts when adjudicating similar disputes. Thus, even from a purely legal perspective there are multiple audiences for such judgments.

A political scientist may think that Supreme Court judgments are relevant for a number of reasons: for example, such decisions may demonstrate a political check on executive or legislative actions, thus justifying the separation of powers; or a decision may have direct relevance to a prominent political issue, thus presenting an opportunity for political mobilisation. This expands the potential audiences for judges and their decision but does not necessarily go far enough.

A cultural viewpoint, however, would provide a more complete perspective. Such a perspective recognises that judicial opinions are used not just by legal and political actors, but by a plethora of individuals, from journalists, academics, businesses, and police forces to citizens and even by others in foreign jurisdictions. Some opinions may even become cultural touchstones, assuming iconic status for citizens (i.e., *Brown* or *Roe*). Thus, to distinguish Supreme Court judgments as meant for a specific group discounts their large cultural relevance. Perhaps Scalia's biting sarcasm or linguistic provocations were a veiled recognition of this cultural perspective. Perhaps he was not intending to "trash" his colleagues or de-legitimise the court, so much as he was attempting to say (in his own unique style, of course): "hey, look at what we're doing here...this is important to everyone".

2. HIS HUMOUR

Justice Scalia famously repeated the line, "I am an originalist. I am a textualist. I am not a nut";⁵² and it was Scalia who first called himself a "faint-hearted originalist".⁵³ He was recognised by many—even by those outside of legal circles—for his caustic wit and his predilection for humour.⁵⁴ Oftentimes during oral argument he would (at least attempt to) liven things up with a sarcastic comment or a joke. Scalia was by far the funniest justice on the Court for the past decade (followed by Stephen Breyer).⁵⁵ The number of laughs he received in oral argument far outpaced any other justice (although there is not a rate for "attempts at humour" versus actual laughs). Nonetheless, Scalia used his humour to establish himself as an interesting and memorable judge.

It is difficult to ascertain just how or why Scalia felt the need to frequently make light of the work of the Court or himself or of a particular situation. Perhaps it was humour for humours sake, and that is fair enough, especially in a world that often takes things far too seriously.⁵⁶ But there are other outcomes stemming from Justice Scalia's humour and engaging writing style. The humour Scalia used on and off the bench and in opinions called attention to him. It made him more than just another dry or overly-technical Supreme Court justice. Thus, Scalia opened himself up on the bench, displaying personality traits in ways

⁵² Jeffrey Rosen, *If Scalia Had His Way*, N.Y. TIMES (January 8, 2011), <http://nyti.ms/1H77IMw>.

⁵³ Antonin Scalia, *Originalism: The Lessor Evil*, 57 U. CIN. L. REV. 849, 864.

⁵⁴ See, e.g., in this collection, James Allen, *supra* note 18.

⁵⁵ Ryan A. Malphurs, Jaime Bochantin, L. Hailey Drescher and Melissa Wallace Framer, *Too much Frivolity, Not Enough Femininity: A Study of Gender and Humor at the U.S. Supreme Court* (2013), <https://ssrn.com/abstract=2335613>.

⁵⁶ *Justice Scalia's Under-the-Chin Gesture*, NPR (March 30, 2006), <http://www.npr.org/templates/story/story.php?storyId=5312065>.

that other justices remain hesitant to do. This is helpful to understanding Scalia's status as "sacred symbol". The idea that a judge is not just a judge, but a living, breathing and as it sometimes turns out, entertaining person, is something that the law—rightly or wrongly—attempts to hide through overarching principles and codes of behaviour. It was not as if Scalia disrespected those principles—although some certainly claim that he did—but that he challenged the traditional notions of judging.

C. LEADING INTERPRETATIVE THEORIST AND MARKETER

Scalia's influence on American law—and perhaps more importantly, how constitutional cases are interpreted throughout the state and federal judiciary—was immense. He championed⁵⁷ originalist and textualist interpretative theories,⁵⁸ and was not bashful when confronting others who operated on different interpretations.⁵⁹

Many US judges have been recognised as leading interpretative theorists, but not all of them sat on the Supreme Court. Jerome Frank, a leader in the legal realist movement, sat on the US Court of Appeals for the Second Circuit (1941-1957). His first book, *Law and the Modern Mind*,⁶⁰ written after he had undergone six months of psychotherapy, was extremely influential among judges and scholars. Transaction Publishing has even recently re-published the book, with an introduction from celebrated constitutional scholar Brian H. Bix.⁶¹ Another more recent example is Richard Posner, who has served on the US Court of Appeals for the Seventh Circuit from 1981. He is a leading proponent of law and economics, and his 1973 book, *The Economic Analysis of Law*,⁶² was widely acclaimed.

Other jurisdictions have had their share of heavyweight legal intellectuals. Given its status as the birth of the common law, Britain is one of those places. Judges such as William Blackstone⁶³ and Sir Edward Coke⁶⁴ were giants of their day, not to mention more contemporary figures, such as Lord Denning⁶⁵ and Tom Bingham.⁶⁶ And yet, judges in the UK remain relatively insulated from public scrutiny.⁶⁷ While already a towering figure in UK legal circles, Bingham became famous for his articulation of the rule of law.⁶⁸ But as prominent as Bingham was, not many citizens outside legal circles knew him. In fact, there is probably a significant percentage of Brits that cannot name a sitting judge, let alone a UK Supreme Court justice.

⁵⁷ Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in GRANT HUSCROFT AND BRADLEY W. MILLER (EDS), *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* (2011), 22-23.

⁵⁸ ANTONIN SCALIA AND BRIAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

⁵⁹ See James Allen, *supra* note 18.

⁶⁰ JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

⁶¹ JEROME FRANK, *LAW AND THE MODERN MIND* (2009).

⁶² RICHARD POSNER, *THE ECONOMIC ANALYSIS OF LAW* (1973).

⁶³ See, e.g., WILFRID PREST (ED.), *BLACKSTONE AND HIS COMMENTARIES: BIOGRAPHY, LAW HISTORY* (2009).

⁶⁴ See, e.g., DAVID CHAN SMITH, *SIR EDWARD COKE AND THE REFORMATION OF THE LAWS: RELIGION, POLITICS AND JURISPRUDENCE, 1578-1616* (2014).

⁶⁵ See, e.g., EDMUND HEWARD, *LORD DENNING: A BIOGRAPHY* (2ND ED.)(1997); LORD DENNING, *THE CLOSING CHAPTER* (1983).

⁶⁶ See, e.g., MADS ANDENAS AND DUNCAN FAIRGRIEVE, *TOM BINGHAM AND THE TRANSFORMATION OF THE LAW* (2011).

⁶⁷ Although, the latest reaction to the High Court's decision regarding Brexit (*Miller v Secretary of State for Exiting the European Union* [2016]), may demonstrate that things are changing in Britain.

⁶⁸ TOM BINGHAM, *THE RULE OF LAW* (2011).

Throughout history American judges have produced serious, academic scholarship,⁶⁹ some of which pushed the bounds of legal or interpretative theory. Thus books, law review articles and speeches have been commonly accepted media for judges. But what happens when the bounds of academic scholarship stretch into quasi-promotional events?

Engaging in academic scholarship is fundamentally different from actively marketing ideas to the citizenry. And yet Scalia engaged in such marketing activities. At one point the *Wall St. Journal* characterised his many public appearances as “The Justice Scalia Roadshow”.⁷⁰ While promoting books late in his career, such as *Making Your Case*⁷¹ and *Reading Law*,⁷² he made many appearances on television shows that Supreme Court justices do not usually find themselves on, such as *60 Minutes* (CBS), *Charlie Rose* (PBS), *Piers Morgan Tonight* (CNN) and *Fox News Sunday* (Fox). According to the US Code of Judicial Conduct, these appearances apparently fall under Canon 4(A)(1): “Speaking, Writing and Teaching”.⁷³ After all, Scalia was promoting his book that was about “the law, the legal system, and the administration of justice”.⁷⁴ Scalia certainly pushed the bounds regarding what is acceptable/unacceptable in this domain.

1. SCALIA, JUDGING AND POP CULTURE

Although US Supreme Court decisions have been shown to generally follow public opinion,⁷⁵ the court itself, historically, has been slow to catch on with certain aspects of popular culture (e.g., televised hearings). This is unsurprising in some respects. Many justices shy away from the limelight, leaving it to those in the political branches. After all, the role of judging traditionally does not involve “making news” in the promotional sense. But there was one area in which Scalia was genuinely in tune with popular culture: in his theory of originalism.

The theory of originalism has a deep association with American popular culture and the public’s understanding of state symbols such as the Founders and the Constitution. Indeed we are not the first ones to make this case.⁷⁶ Further, originalist and textualist interpretative methods have deep roots Justice Hugo Black (1937-1971) was a strong proponent of these methods and was unafraid to advocate them to others.⁷⁷ Part of the connection between originalism and popular culture arises from the long-held idolisation of the 1789 American Constitution. Even though the current reach of the Constitution would probably be

⁶⁹ Shaman, *supra* note 29.

⁷⁰ Dan Slater, *Scalia Justifies His Jurisprudence: ‘I am Not a Nut’*, WSJ LAW BLOG (April 8, 2008), <http://blogs.wsj.com/law/2008/04/08/scalia-justifies-his-jurisprudence-i-am-not-a-nut/>.

⁷¹ ANTONIN SCALIA AND BRYAN GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (2008).

⁷² ANTONIN SCALIA AND BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

⁷³ *Code of Conduct for United States Judges*, <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#e>.

⁷⁴ *Id.*

⁷⁵ For a historical take on this, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); for a more modern take, see Gerald Rosenberg, *The Road Taken: Robert A. Dahl’s Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L.J. 613 (2001).

⁷⁶ See Jack M. Balkin, *Why are Americans Originalists?*, In DAVID SCHIFF AND RICHARD NOBLES (EDS.), *LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL* (2015); there is also a rebuttal to this piece here: Ilya Somin, *The origins of originalism*, WASH. POST (January 21, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/21/the-origins-of-originalism/>; See also Eric A. Posner, *Trump and the Originalists*, available at <http://ericposner.com/trump-and-the-originalists/>.

⁷⁷ Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25 (1994).

unrecognisable to the Founders,⁷⁸ and even though specific sections of the constitution seem antiquated, the American public continues to engage in a form of constitutional worship that is difficult to find anywhere else.⁷⁹

Scalia's use of originalism is certainly not the only example of his unique connection to popular culture. Scalia's judicial and extra-judicial writings, in addition to his courtroom and non-courtroom antics, generally got a wide amount of media attention.⁸⁰ One such example came during oral argument in *Department of Health and Human Services v. Florida*,⁸¹ when Scalia compared the government making everyone purchase health insurance to the government making everyone eat broccoli. Although this line is often thought of as a Scalia original, he actually borrowed it.⁸² Nevertheless, Scalia was keen enough to pick up this argument and use it during oral argument. Although his plea was ultimately unsuccessful, it certainly influenced the debate about the Affordable Care Act, and more pointedly, the Supreme Court's 2012 judgment of the law in *Sebelius*.⁸³

But Scalia was far from the only Supreme Court justice to permeate popular culture. In fact, other SCOTUS justices, such as Ruth Bader Ginsberg, are also prominent pop culture symbols. After all, the latter has her own nickname (The Notorious RGB),⁸⁴ her own fan blog,⁸⁵ and of late has been outspoken on some inherently political issues.⁸⁶ On the fan blog visitors can even purchase a merchandise, including baby clothes, coffee mugs, and carrier bags.⁸⁷ But Ginsburg is not as divisive as Scalia,⁸⁸ not as formidable an interpretive theorist, and certainly not as humorous or biting (not on the bench, nor in her opinions).

This pop culture relevance can be contrasted with other countries that have Supreme or Constitutional Courts. In some jurisdictions judges are widely viewed as out of touch with popular culture; and indeed, they are certainly not known or "celebrated" in the same way as SCOTUS justices. This is certainly the case in Britain, as the judiciary on the whole is relatively unknown outside of legal circles, has been criticised as being out of touch, un-

⁷⁸ For example, the prospects of constitutional review of legislation and the striking down of Acts of Congress, although it occurs on a regular basis today, were not inherent features of the 1789 Constitution. These aspects were decided in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁷⁹ Brian Christopher Jones, *Preliminary Warnings on Constitutional Idolatry*, PUB. LAW 74 (2016).

⁸⁰ Steve Twomey, *Scalia Angrily Defends His Duck Hunt with Cheney*, N.Y. TIMES (March 18, 2004), <http://nyti.ms/29x8clq>.

⁸¹ *Department of Health and Human Services v. Florida* (Oral Argument)(March 27, 2012), p. 13, https://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf ("Could you define the market -- everybody has to buy food sooner or later. So, you define the market as food; therefore, everybody's in the market; therefore, you can make people buy broccoli").

⁸² The trail that stretches back to the early 1990s when Bill Clinton proposed a universal health care system. David B. Rivkin Jr., a prominent libertarian lawyer, penned an op-ed in the Wall St. Journal asking a similar question: can the government regulate the diets of those it deems overweight? After consultation by Mr. Rivkin in 2009, Senator Orin Hatch (R., UT) made a similar point about buying "certain cars, dishwashers or refrigerators". This led to Terence Jeffrey's 2009 article in CNS News entitled: "Can Obama and Congress Order You to Buy Broccoli." (See Terence P. Jeffrey, *Can Obama and Congress Order You to Buy Broccoli?*, CNS NEWS (October 21, 2009), <http://cnsnews.com/blog/terence-p-jeffrey/can-obama-and-congress-order-you-buy-broccoli>.)

⁸³ *National Federation of Independent Business v. Sebelius*, 567 U.S. ____ (2012).

⁸⁴ This is modelled after famous 1990s rapper, the late Notorious B.I.G.

⁸⁵ See <http://notoriousrbg.tumblr.com/>.

⁸⁶ Michael D. Shear, *Ruth Bader Ginsburg Expresses Regret for Criticising Donald Trump*, N.Y. TIMES (July 14, 2016), <http://nyti.ms/29AWs0l>.

⁸⁷ One of the coffee mugs available even bears the inscription "The Ruth will set you free".

⁸⁸ Although, she did speak out against a Donald Trump presidency in July 2016: Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N. Y. TIMES (July 10, 2016), <http://nyti.ms/29rq7tH>.

representative, and oblivious to popular culture. This widely held perception throughout the UK led to the 2012 announcement that judges must undergo cultural awareness training at the Judicial College.⁸⁹ Last December a second-year law student penned a prominent piece for the *Guardian* newspaper about how members of the UK Supreme Court did not look like they had “ever put down their copy of Intellectual Property Quarterly to pick up an iPod, tossed aside their *Neue Juristische Wochenschrift* to grab a *Now* magazine or looked up from the *Cambridge Law Journal* to watch some *Celebrity Juice*”.⁹⁰ Further, in 2013 a sitting Supreme Court justice, Baroness Hale, even proclaimed that many judges lead “sheltered lives”.⁹¹

At some rudimentary level, being in tune with popular culture means that judges must understand and use the technology that is shaping society, and which can open up the judiciary to increased transparency and accountability. Perhaps surprisingly, this is where Scalia—and on an institutional level, the US Supreme Court more generally—have repeatedly chosen to be out of step with popular culture.⁹² Compared with other constitutional courts, their ideas on the use of technology both inside the courtroom and out is out of step with evolving standards.⁹³ Cameras in the courtroom are one such example. For a variety of reasons, the US Supreme Court refuses to allow cameras to televise their proceedings. And yet in some countries this is common practice. For instance, the UK Supreme Court now video records all hearings and judgment announcements, and these can be streamed live and are also archived on their website.⁹⁴ Additionally, the UKSC has Twitter, Youtube and Flickr channels as well.⁹⁵ Even with all these accoutrements, the status of UKSC justices in popular culture remains well below their transatlantic counterparts.

From the above, it should be obvious that Scalia had an ambivalent relationship with popular culture, engaging with it when it suited his interpretive style, method of justice, or promotional aspirations, and also shunning it when it could potentially take him out of his comfort zone or damage his credibility.

IV. JUSTICE SCALIA AS “SACRED SYMBOL”

Calling Scalia a “sacred symbol” captures something of his significance in law, politics, and popular culture. As we see it for a judge to become a sacred symbol he or she must:

⁸⁹ Jack Doyle, *Out-of-touch judges to be given lessons in popular culture (after one asked who are the Beatles?)*, DAILY MAIL (June 16, 2012), <http://www.dailymail.co.uk/news/article-2160110/Out-touch-judges-given-lessons-popular-culture-asked-Beatles.html>.

⁹⁰ Kier Baker, *Pop culture 101: a guide for out-of-touch judges*, GUARDIAN (10 December 2015), <https://www.theguardian.com/law/2015/dec/10/pop-culture-101-a-guide-for-out-of-touch-judges>.

⁹¹ David Barrett, *Judges lead 'sheltered lives', warns Britain's most senior female judge*, TELEGRAPH (April 6, 2013), <http://www.telegraph.co.uk/news/uknews/law-and-order/9976400/Judges-lead-sheltered-lives-warns-Britains-most-senior-female-judge.html>.

⁹² See, e.g., Tal Kopan, *Scalia: Cameras in Supreme Court would 'mis-educate' Americans*, POLITICO (July 26, 2012), <http://www.politico.com/blogs/under-the-radar/2012/07/scalia-cameras-in-supreme-court-would-mis-educate-americans-130246>.

⁹³ See, e.g., Jones, *Disparaging the Supreme Court*, *supra* note 26, at 255-60.

⁹⁴ *News Release: Catch-up on Court Action: Supreme Court Launches 'Video on Demand' Service*, SUP. CT. (May 5, 2015), <https://www.supremecourt.uk/news/catch-up-on-court-action-supreme-court-launches-video-on-demand-service.html>. The Court does have a specific “terms of use” policy, where footage is only allowed to be accessed through their site.

⁹⁵ UK Supreme Court (@UKSupremeCourt), TWITTER, <https://twitter.com/uksupremecourt>; UKSupremeCourt, YOUTUBE, <https://www.youtube.com/user/UKSupremeCourt>; UK Supreme Court, FLICKR, <https://www.flickr.com/photos/uksupremecourt>.

- (1) *profoundly affect the course of American jurisprudence*⁹⁶ *through either*
 (a) *the significance and impact of his/her judicial opinions,*
 (b) *his/her influence on other members of the judiciary, or*
 (c) *through his/her extra-judicial writing/speaking;*
 and
 (2) *have a large segment of the citizenry—including those outside legal and political circles—become attached.*

Some justices may fulfil one or the other of these criteria, but not both. Justice Ginsburg clearly satisfies the second, considering that a large segment of Americans know her, identify with her, and hold her in high esteem. However—while certainly no intellectual slouch—it would be difficult to say that she has “profoundly” affected the course of American jurisprudence. On the flip side judges have often profoundly affected American jurisprudence, but for whatever reason, have not achieved much societal attachment.

V. CONCLUSION

When a judge becomes a “sacred symbol” he/she may foment internal division on a court, and attract wanted and unwanted attention. In Scalia’s case the intense controversy surrounding President Obama’s effort to replace him arose from Scalia’s status as a “sacred symbol”. Judges as “sacred symbols” may impose high costs on the courts on which they sit and in the legal systems in which they serve.

Recently Keith Bybee splendidly articulated the complex duality of the American legal system: that even though citizens tend to recognise judges as independent actors who make impartial decisions, so to do they recognise that politics or partisanship plays a vital role in judicial decision-making.⁹⁷ Bybee believes that these are “acceptable hypocrisies”, and that (American) courts depend on them to function.⁹⁸ Justice Scalia’s story also displays such potential hypocrisies: at times it is difficult to tell whether or not Scalia was pushing the bounds of legal and political legitimacy, or in fact, the bounds of legal and political hypocrisy.⁹⁹ Perhaps he was doing both.

⁹⁶ Although, it does not necessarily have to be “American” jurisprudence; the “American” label can be dropped if need be. Yet, given that we’re primary analysing American law, that is what we have inserted here.

⁹⁷ Bybee, *supra* note 44.

⁹⁸ *Id.*

⁹⁹ We thank Institutum Iurisprudentiae, Academia Sinica Assistant Research Professor Yen-Tu Su for this particular insight.